Nos. 08-289 and 08-294

In The Supreme Court of the United States

THOMAS C. HORNE, SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF ARIZONA,

Petitioner,

v.

MIRIAM FLORES, *et al.*,

Respondents.

and

SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES AND PRESIDENT OF THE ARIZONA SENATE,

Petitioners,

v.

MIRIAM FLORES, *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* TUCSON UNIFIED SCHOOL DISTRICT, MESA UNIFIED SCHOOL DISTRICT, SUNNYSIDE UNIFIED SCHOOL DISTRICT, TEMPE ELEMENTARY SCHOOL DISTRICT AND PHOENIX UNION HIGH SCHOOL DISTRICT IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

IDENTITY AND INTEREST OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. Relevant Factual and Procedural Background 4

II. The District Court Has Been Careful Not to Intrude into the Legislative Realm But Has, Instead, Respected Local Control to the Greatest Degree Possible 7

III. "ELL Students Need Extra Help and That Costs Extra Money." 9

A. Arizona school districts face great challenges in educating ELL students .. 10

B. Arizona school districts require more ELL education resources than the State is currently providing 15

C. Arizona school districts should not be forced to rob from limited general education funds in order to provide adequate ELL instruction 17

IV. Neither General Funding Increases Nor HB 2064 Provide Adequate Resources for ELL Instruction 22

TABLE OF CONTENTS – Continued

Page

A. General funding increases do not solve the problem of providing equal educational opportunities to all students 22

B. HB 2064 continues to fund ELL programs arbitrarily and capriciously... 23

CONCLUSION 25

TABLE OF AUTHORITIES

Page

CASES

Castenada v. Pickard, 648 F.2d 989 (5th Cir. 1981) 7, 20

Flores v. Arizona, 480 F.Supp.2d 1157 (D. Ariz. 2007) ("*Flores II*") 10, 19, 20, 24, 25

Flores v. Arizona, 516 F.3d 1140 (9th Cir. 2008) ("*Flores III*") 1, 13, 14, 16, 20, 25

Flores v. State of Arizona, 172 F.Supp.2d 1225 (D. Ariz. 2000) ("*Flores I*") 5, 11, 16

Jenkins v. Missouri, 639 F.Supp. 19 (W.D. Mo. 1985) 7

Youngberg v. Romeo, 457 U.S. 307 (1982) 8

STATUTES

20 U.S.C. § 1701 *et seq.* ..... *passim*

20 U.S.C. § 1703(f) 20

20 U.S.C. § 6301 3

A.R.S. § 15-905 18

A.R.S. § 15-910 23

MISCELLANEOUS

Rule 37.4, Rules of the United States Supreme Court 2

http://nces.ed.gov/pubsearch 18

TABLE OF AUTHORITIES

Page

http://www10.ade.az.gov/ReportCard/District Details.aspx?id=4457&ReportLevel=2 19

IDENTITY AND INTEREST OF *AMICI CURIAE*

Tucson Unified School District ("TUSD"), Mesa Unified School District ("MUSD"), Sunnyside Unified School District ("SUSD"), Tempe Elementary School District ("TESD") and Phoenix Union High School District ("PUHSD"), collectively "*Amici,*" support the position of the Respondents. *Amici* are Arizona school districts with significant ELL student populations. TUSD and MUSD, the two largest school districts in Arizona, educate approximately 8,000 ELL students each. SUSD, PUHSD and TESD educate approximately 5,000, 4,000, and 2,900 ELL students respectively and all have ELL student populations that significantly exceed the statewide average of ELLs as a percent of total students. *Amici* are only too aware that the State of Arizona (the "State") continues to woefully under-fund ELL programs and that no changed circumstances have ameliorated the need for funding that rationally relates to the actual cost of ELL programs.

Because *Amici* are intimately involved in the day-to-day education of ELL students, they are in the unique position of being able to offer to the Court an overview of what is required to provide adequate ELL instruction to the over 146,000 ELL students in Arizona. As demonstrated by the eight-day evidentiary hearing held in January 2007, the State's funding of ELL programs falls far below what is needed for even the most minimum requirements of a successful ELL program. *Amici* urge the Court to affirm the Ninth Circuit decision in *Flores v. Arizona*, 516

F.3d 1140 (9th Cir. 2008) ("*Flores III*"), and the District Court's March 2007 Order holding that: (1) there were and are no changed circumstances that require modification of the District Court's original judgment issued in January 2000 ("Original Judgment"); (2) the State of Arizona continues to violate the Equal Education Opportunity Act, 20 U.S.C. § 1701 *et seq.*, ("EEOA") by failing to fund ELL programs in a manner that rationally relates to the actual cost of such programs; and (3) the Arizona legislature's answer to ELL funding, House Bill 2064 ("HB 2064") continues to fund ELL programs arbitrarily and capriciously and in a manner that violates federal and state laws.

Amici file this brief pursuant to Rule 37.4, Rules of the United States Supreme Court.

SUMMARY OF THE ARGUMENT

Like Respondents the State of Arizona and Arizona State Board of Education, *Amici* believe that the supplanting provisions of HB 2064 are fatal to that legislation. Not only do those provisions put all of Arizona's federal funding at risk, they seriously impact *Amici*. The *Amici* districts each receive funding in many if not most of the categories of funding that HB 2064 requires to be offset. In addition, and as indicated above, each of the *Amici* districts educate large ELL populations. As a result, *Amici* will be directly and severely prejudiced if HB 2064 and its supplanting provisions go into full effect. Like

Respondents Flores, *et al.* and Rzeslawski ("Plaintiffs"), *Amici* believe that the No Child Left Behind Act, 20 U.S.C. § 6301 et seq., ("NCLB") and the EEOA serve different purposes: NCLB focuses on outcomes and accountability while the EEOA is a civil rights statute focusing on equal educational opportunities. In this brief, however, *Amici* will focus on the following two issues: (1) contrary to arguments made by the Petitioners, the District Court has shown appropriate deference to local control of education by the State of Arizona; and (2) Petitioners' argument that increases in general funding for education in Arizona, combined with the modest funding increases in ELL monies, obviate the need for additional funding for ELL instruction is not only wholly unrealistic, but also guarantees a discriminatory result.

First, Petitioners ask this Court to restore "local control" over Arizona's schools and argue that the District Court has interfered with the State's discretion to choose a method of compliance with the EEOA. *Amici* support the notion of local control. Throughout this case, however, the District Court has been very careful to avoid choosing the methods the State must use to comply with the EEOA. Instead, the Court has exhibited appropriate deference for local decision making and has merely required that the methods chosen by the State be funded in a way that is rational. The State, however, has been unable to demonstrate that its funding plan is in any manner rationally related to the cost of ELL instruction because, in fact, it is not.

Second, Petitioners argue that general funding increases that have relatively recently been provided to Arizona school districts, coupled with modest funding increases targeted for ELL education, constitute changed circumstances. Increases in general education funding that do little more than keep pace with inflation, however, do not satisfy the Original Judgment, and that is what school districts have received. HB 2064, a law passed by the Arizona legislature in 2006 ostensibly to comply with the Original Judgment, continues to fund ELL programs in an arbitrary, capricious and inadequate manner. Furthermore, expecting Arizona school districts with large ELL populations to fund ELL education primarily with general education funds that are barely adequate to cover basic educational needs improperly forces such school districts to choose between adequately funding ELL education and adequately funding basic educational services. For school districts such as *Amici* with large ELL populations, either option is untenable and each has a discriminatory impact on the thousands of ELL students in those districts.

ARGUMENT

I. Relevant Factual and Procedural Background.

The Original Judgment held that Arizona was in violation of the EEOA because it funded ELL

programs in an arbitrary and capricious manner. *Flores v. State of Arizona*, 172 F.Supp.2d 1225 (D. Ariz. 2000) ("*Flores I*"). In October of 2000, the District Court ordered the State to perform a cost study to determine the amount of funding necessary to adequately fund ELL programs in Arizona's public schools. To date, the State has not provided a cost study that it deems acceptable or reasonably accurate. Thus, the State has never directly determined the cost of adequately funding Arizona's ELL programs.

Because the State continued to violate the Original Judgment, the District Court issued an order in January of 2005 mandating that the State comply with the Original Judgment by the end of the then-pending legislative session "by appropriately and constitutionally funding the state's ELL programs." In March of 2006, after the District Court imposed fines on the State, the Arizona legislature passed HB 2064. Unfortunately, however, the funding scheme set forth in HB 2064 ensures that the State will never adequately fund Arizona's ELL programs.

After the District Court struck down HB 2064, Petitioners appealed and the Ninth Circuit remanded the case to the District Court for an evidentiary hearing to determine whether changed circumstances required modification of the Original Judgment. During the ensuing evidentiary hearing, Petitioners offered testimony from administrators at the Arizona Department of Education ("ADE") and Plaintiffs offered testimony from administrators from five

different Arizona school districts. The parties also submitted documents including cost sheets from school districts listing those districts' ELL instructional costs. The ELL instructional costs generally ranged between $1,500 and $3,300 per pupil, or approximately $1,100 to $2,900 more per pupil than what the State currently provides for ELL programs.

The State currently provides $365 per pupil for ELL instruction. HB 2064 increases this amount to $444 per student, but cuts this funding off completely for any ELL student receiving ELL instruction for more than two years. This cut-off of funds occurs despite the fact that both Petitioners' and Plaintiffs' witnesses agreed that many ELL students take more than two years to become proficient in English. HB 2064 allows districts to apply for additional funding, but many Arizona school districts, including all of the *Amici* districts, would either not be able to seek additional ELL funding or would have their additional funding requests drastically reduced as a result of the law's required offsets. In summary, the voluminous evidence presented at the hearing reaffirmed that the State continues to violate the EEOA because the cost of providing ELL instruction far exceeds both the current ELL appropriation and the appropriation referenced in HB 2064.

In March of 2007, the District Court correctly determined that based on the evidence received during the eight-day hearing, there were no changed circumstances that warranted modification of the Original Judgment. The District Court also reaffirmed that its

previous orders applied to the state-wide funding of ELL programs and not just to the State's funding of ELL instruction in Nogales Unified School District ("NUSD") where Plaintiffs reside because "[j]ust as the State has to consider all school districts when coming up with funds for a single district like NUSD, it is impossible to limit the effects of the judgment and the Court's Order to NUSD." *Amici* concur with all aspects of the District Court's well-reasoned order and the Ninth Circuit opinion affirming it. Without the March 2007 Order, the inadequate funding of ELL instructional programs in the State of Arizona will continue, with resulting harm to school districts and their students.

II. The District Court Has Been Careful Not to Intrude into the Legislative Realm But Has, Instead, Respected Local Control to the Greatest Degree Possible.

The Petitioners' and Superintendent's briefs are filled with hyperbole suggesting that the District Court has improperly usurped local control of Arizona school districts. The Speaker of the House and the President of the Senate cite *Jenkins v. Missouri,* 639 F.Supp. 19, 23-24 (W.D. Mo. 1985), presumably to raise the spectre of a federal court directing Arizona as to how its schools must be operated. Brief of Petitioners at p. 10. They speak of the evils of the federal government "micro-managing" school districts. *Id.* at p. 11, *see also*, p. 62. They cite *Castenada v. Pickard,* 648 F.2d 989, 1009 (5th Cir. 1981), for the proposition

that courts may not choose between sound but competing theories of educating ELLs and argue that the District Court's injunction contravenes Congressional policy that state and local officials be given flexibility to implement ELL programs that they believe are "most effective." Brief of Petitioners at p. 62. The Superintendent echoes this same theme in his brief. He demands discretion for local authorities in how to cure a federal violation, Brief of Superintendent at p. 32, and notes that it is the legislature's prerogative to determine "which of several professionally acceptable choices should have been made," *id.* at 40, quoting *Youngberg v. Romeo,* 457 U.S. 307, 321 (1982).

None of this hyperbole, however, reflects the reality of this case. The District Court has not directed the State to implement any particular ELL program. Instead, it has consistently let the State make its own choices both with respect to what type of ELL program the State desires to implement as well as how the State desires to fund the program it has selected. The State, however, has not shown how its funding scheme is related to any reasonably and professionally acceptable "choice" regarding ELL instruction. The District Court's insistence that the State reasonably demonstrate how its chosen method of ELL instruction will financially be able to be implemented is not an abuse of its discretion.

Counsel for Petitioners the Speaker of the House and the President of the Senate, Mr. David Cantelme, recently acknowledged in open court that the District Court has not intruded on the State's right to make

its own choices as to how to educate ELL students. In November of 2008, Mr. Cantelme addressed the District Court, stating, "this Court has never second-guessed, ever, the state experts in education . . . you have been very careful . . . never to substitute your judgment or your predecessor's judgment as to pedagogical issues for those of the state authorities." Transcript from 11/4/08, Day one of the November 2008 evidentiary hearing, p. 12, lines 13-15, 18-21. It is disingenuous and inaccurate for Petitioners to suggest that the District Court is "micro-managing" any aspect of the operation of Arizona school districts.

Petitioners plead for the restoration of local control and state that further litigation "would mostly serve to impose unnecessary burdens on Arizona's schools, sapping the energy and flexibility of school administrators and further draining the public fisc in a period of strained finances." Petitioners' Brief at 65. *Amici* are among the Arizona schools about which Petitioners speak and do not share Petitioners' sentiments. The District Court has merely attempted to hold Arizona responsible for providing adequate resources to enable school districts with large ELL student populations to comply with the EEOA.

III. "ELL Students Need Extra Help and That Costs Extra Money."

After listening to eight days of testimony from Arizona administrators and educators knowledgeable in the area of ELL instruction and programming, the

District Court found that "ELL students need extra help and that costs extra money." *Flores v. Arizona*, 480 F.Supp.2d 1157, 1161 (D. Ariz. 2007) ("*Flores II*"). While the Arizona legislature has at least implicitly acknowledged this fact, it continues to misapprehend the scope of resources required to provide ELL students equal education opportunities as required by the EEOA.

A. Arizona school districts face great challenges in educating ELL students.

In November of 2000, Arizona voters passed Proposition 203 mandating that all ELL students be instructed in English. With limited exceptions, this law eliminates bilingual education and requires that all instruction – both that pertaining to language development as well as academic content – be provided to ELL students in the English language. In practical terms, Proposition 203 means that school districts must provide students who have no or limited understanding of the English language with tools and services that will allow such students not only to learn English, but at the same time also to learn academic subject areas such as math, social studies, science and history.

ELL instruction is comprised of two components. One component is language development to increase a student's proficiency in the English language. This is sometimes referred to as "English as a Second Language" or "ESL". During ESL, students are

taught how to speak, read, write and generally function in the English language. ESL is most effective when it is tailored to the specific proficiency level of a given ELL student. ADE recognizes five different proficiency levels. Ideally, ELL programs should provide separate ESL services to students in each of the different proficiency levels.

The second component of ELL instruction involves providing ELL students with instruction in academic content areas such as math, social studies, science and history. Ensuring that ELL students have access to the academic curriculum, as well as language development, is necessary to fulfill the EEOA. *Flores I*, 172 F.Supp.2d 1225. Because Proposition 203 requires all instruction to be in English, school districts must ensure that a student who has little if any English-language skills can learn, for example, science in an English-only science class or history in an English-only history class. As the Court might imagine, teaching the scientific method or the American Revolution in English to a student who speaks little or no English is an enormous challenge. For this reason, academic content classes containing ELL students must be taught using a specific instructional method referred to as "Sheltered English Immersion" or "SEI". Teachers must be specifically trained in SEI so that they can effectively communicate the day's lessons to children who to some degree do not speak the same language as the teacher.

SEI classes are costly. SEI teachers must be highly qualified in the content areas they teach *and*

must be certified in SEI. SEI teachers also require ongoing training in SEI methods. For SEI classrooms to be effective, they should contain fewer students than mainstream classes because SEI teachers must be able to provide ELL students with an adequate degree of individualized attention. Making sure that qualified SEI teachers are present in properly sized SEI classes is crucial because, as a result of Arizona's English immersion law, SEI instruction is the primary assistance an ELL student receives when he or she is placed in an English-only classroom and expected to learn academic content.

A successful ELL program needs to include both ESL and SEI instruction during the school day. Recently, the State of Arizona Department of Education has adopted an ELL instructional model requiring school districts to provide ELL students with four hours of intense ELL instruction per day in a segregated classroom with a relatively low student/teacher ratio. ELL students must also separately receive academic content in SEI classrooms. Both aspects of this program are expensive.

It is imperative that school districts have highly trained SEI teachers. ADE's SEI certification program, which requires teachers to take a mere four credit hours of instruction, is just the first step toward providing the kind of training required to teach teachers how to provide academic content instruction to students who are not yet proficient in English. For this reason, TUSD, SUSD and MUSD employ "coaches" or "demonstration teachers" who provide

ongoing training to teachers in SEI methodology. These coaches also spend time modeling successful teaching techniques for SEI teachers, observing SEI teachers, and providing feedback to SEI teachers so that they can become more effective in teaching ELL students. Despite their best efforts, *Amici* school districts struggle to find funds to adequately train SEI teachers. They also lack funds to hire highly qualified SEI teachers who have both SEI and ESL endorsements. As the Ninth Circuit pointed out, one of the Petitioners' own experts testified that a 15:1 student/teacher ratio would significantly enhance English learning success. NUSD's Superintendent, however, testified that NUSD could not recruit sufficient teachers to achieve this ratio due to resource constraints. *Flores III*, 516 F.3d at 1157.

The challenges school districts face in educating elementary grade level ELL students only increase at the middle and high school levels. Districts must hire teachers who are highly qualified as defined by NCLB and who also have appropriate content area and SEI certification. Optimally, these teachers should also be ESL certified; less optimally, they should be at least ESL proficient. Instructing middle and high school ELL students is also difficult due to the fact that students have fewer years to master both English and required substantive content areas. Beginning in the 2005-2006 school year, Arizona made passing the AIMS test a requirement for high school graduation. The AIMS test is given in English.

At the evidentiary hearing in January of 2007, one of Petitioners' own witnesses testified that AIMS scores of NUSD high school ELL students are unacceptably low. Testimony at the hearing showed that even though some NUSD elementary schools have relatively high ELL AIMS scores, NUSD high school AIMS scores are among the lowest in the State. *Flores III*, 516 F.3d at 1158-59. *Amici* and other school districts with large ELL student populations struggle to achieve acceptable AIMS scores. Low AIMS scores for ELL seniors have a particularly devastating effect as many of these students will become discouraged by their inability to graduate and drop out of school.

In addition to receiving adequate ESL and SEI instruction, ELL student success is also contingent on the degree of extra assistance an ELL student receives by way of before- and after-school tutoring programs, the amount of support and translation services offered to ELL parents so that they can be a constructive part of their child's education, and the extent of assessment and tracking a school is able to undertake. ADE requires school districts to test ELL students' English proficiency at least once per year and to submit the test result data to ADE. Neither the State nor ADE provides school districts with additional funding to perform these tasks. School districts also do not receive additional funding to perform ongoing tracking and assessment of ELL achievement. These efforts are important because they assist districts in measuring their ELL students'

proficiency levels in order to determine what type of additional ELL instruction should be provided to such students. Reviewing test data and creating instructional plans based on this data is a time-intensive task that often requires schools to hire one or more full-time employees. For example, TUSD spent approximately $273,400 and SUSD spent approximately $73,460 on ELL assessment personnel and materials during the 2005-2006 school year. A witness for Petitioners admitted that the gains achieved by NUSD's ELL students in recent years were due, in part, to NUSD's use of assessment tools. In the 2005-2006 school year, NUSD spent approximately $92,250 on compiling, tracking and analyzing ELL performance data.

Providing adequate ELL instruction and programs is a complicated and multi-faceted endeavor. School districts are already stretched to their limits in terms of finances, personnel and morale. They will continue to struggle to provide general education and ELL programs in compliance with the EEOA in the absence of minimally adequate assistance and resources from the State.

B. Arizona school districts require more ELL education resources than the State is currently providing.

The January 2007 hearing demonstrated that the per pupil cost of ELL instruction during the 2005-2006 school year was $1,570 at NUSD, $2,749 at

TUSD, and $3,300 at Glendale Union High School District ("GUHSD").[1] A cost study performed by ADE almost twenty years ago showed that the per pupil ELL instruction cost in 1988-1989 was approximately $450 per student per year. *Flores I*, 172 F.Supp.2d at 1238-39. The national experts hired by the State offered the opinion that ELL instruction costs between $1,026 to $2,571 per pupil and experts from the State of Arizona hired by the State estimated the cost to be $1,447 to $1,785 per student. Petitioners' Appendix at 19a. And yet, as of the 2005-2006 school year, the State provided only $365 per pupil for ELL instruction. HB 2064 would increase that amount to $444 (almost the amount required twenty years ago), but even witnesses for the Petitioners could not establish what data supported the State's per pupil funding. *Flores III*, 516 F.3d at 1155.

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[1] During the evidentiary hearing, Petitioners' own witness held GUHSD out as an example of a school district that had made exemplary strides in educating its ELL students. Among the programs at GUHSD that have made that district's ELL programs so successful are small first-year ELL classes, intensive teacher training, one-on-one tutoring from a teacher and an English-proficient student, language acquisition computer programs, teacher mentors, a summer language learner course, social workers, and interpreting services for parents. GUHSD's success involves the expenditure of approximately $3,300 per ELL student.

C. Arizona school districts should not be forced to rob from limited general education funds in order to provide adequate ELL instruction.

Petitioners argue that school districts can always use general maintenance and operation ("M&O") monies to fund their ELL programs and that school districts are not limited to the additional $365 per ELL pupil (or under HB 2064, $444 per ELL pupil) that the legislature provides to school districts based on their ELL counts. The EEOA's requirement that the State provide adequate resources to implement its chosen ELL programs would be meaningless, however, if the State could fulfill the "resource" requirement simply by pointing to all funding that school districts receive. This is especially true if the record is void, as it is here, of any proof that the funding allotted to Arizona schools for general education is at least minimally adequate to provide ELL students with both a basic general education and adequate ELL instruction.

Petitioners' arguments about the use of M&O funds is flawed because Arizona school districts with large ELL student populations cannot divert general education funding to ELL programs without seriously impacting their ability to provide basic educational opportunities. Contrary to the picture painted by Petitioners, Arizona public school districts are not awash in M&O funding. Rather, they are subject to strict, legally imposed budget limits that make Arizona one of the lowest ranking states when it comes

to financing education. *See* A.R.S. § 15-905. A 2007 U.S. Department of Education report on expenditures for public elementary and secondary education ranked Arizona number 50 out of 51 states, including the District of Columbia, in the amount of funding it provides for education based on nationwide comparisons of per pupil expenditures. http://nces.ed.gov/pub search. School districts must use every penny of the scarce M&O funding they receive in order to provide basic education services to their students. Diverting meager M&O funding to ELL instruction would put many if not most school districts with large ELL populations at risk of being unable to comply with State and federal No Child Left Behind achievement requirements. Arizona school districts with large numbers of ELL students thus face a Hobson's choice of starving their ELL programs or starving their general educational programs. For districts with large ELL populations, both of these choices adversely impact large numbers of ELL students, the vast majority of whom are minority students. The most severe impact occurs in school districts with high minority populations.[2] The resulting effect is discrimination prohibited by the EEOA.

Although Petitioners point to the success NUSD has had in educating some of its elementary school

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[2] SUSD provides a good example of this impact. Over 90% of SUSD students are minority students; over 80% qualify economically for free or reduced price lunches; over 30% are ELL students.

ELLs, their facts and statistics do not tell the whole story. The evidence at the hearing was that NUSD achieved its ELL gains by spending $1,570 per student, which is substantially more than the base level funding normally provided by the State. *Flores II*, 480 F.Supp.2d at 1160. Petitioners' briefs tout the success of NUSD ELLs (while choosing not to focus on the low scores of ELL high school students), but avoid talking about the bigger picture. According to ADE's website, NUSD as a whole failed to make Adequate Yearly Progress in 2006, 2007 and 2008. http://www10.ade.az.gov/ReportCard/DistrictDetails.aspx?id=4457&ReportLevel=2. ADE's website also lists the improvement status of NUSD's schools. One of NUSD's elementary schools has a restructuring planned and another has a warning. The District's vocational high school has a corrective action plan in place, and the District's primary high school has a warning.

NUSD's limited success in teaching ELLs English appears to have come at the cost of providing a general education to all of its students, including its many ELL students. The District Court correctly determined that this was not an acceptable state of affairs from an EEOA perspective.

Amici are not arguing that the State is legally obligated to "throw money" at them for the benefit of their respective ELL or general education programs. All *Amici* request is a level playing field so that the vast majority of ELL students are offered equal educational opportunities as compared to students in districts that have relatively low ELL student populations. This type

of discriminatory impact is addressed by the EEOA and the leading case interpreting it, *Castenada*. In *Castenada*, the Fifth Circuit held that the educational agency must not just implement an educational theory to instruct ELLs, it must "follow through with practices, resources and personnel necessary to transform theory into reality." *Castenada*, 648 F.2d at 1008, 1010. The evidence reviewed by the District Court and the Ninth Circuit clearly demonstrates that, while the State has selected a theory to instruct ELL students, it has not followed through with the resources necessary to transform that theory into reality. ("HB 2064 . . . does not provide funding for ELL instruction, for all ELL students, that is rationally related to the cost of that instruction." *Flores II*, 480 F.Supp.2d at 1166.) The EEOA prohibits states from denying equal educational opportunities to students by "the failure by an educational agency to take appropriate action to overcome language barriers that impeded equal participation by its students in its instructional programs." 20 U.S.C. § 1703(f). As the Ninth Circuit correctly stated, "Diverting base level funds – thereby hurting all students in an attempt to equalize opportunities for ELL students – is not an 'appropriate' step." *Flores III*, 516 F.3d at 1171.

Lest there be any doubt that there is something discriminatory and deeply wrong with the State's suggestion that school districts should just use regular M&O funds to cover the cost of ELL instruction, an analogy may be helpful. If a school district were

shown to have discriminated against African-American students for years by providing library facilities and materials at predominately African-American schools that were far inferior to the library facilities and materials at predominately Anglo schools, there would be no doubt but that such discrimination would be required to be remedied. It would be wholly inappropriate, however, for the school district to "remedy" this situation by expecting the predominately African-American schools to divert substantial M&O funds to improve their substandard library facilities and materials. Such a "remedy" might result in better library facilities and materials, but would do so at the expense of equal educational opportunities for the minority students who were the victims of the discrimination in the first place. Petitioners' approach to the Court's finding that Arizona violated the EEOA, however, is analogous to this situation. Petitioners in essence argue that high ELL population schools are obligated to divert substantial M&O funds from other educational needs in order to fund ELL instruction. This obligation cannot be considered "appropriate action" under the EEOA.

In their zeal to argue that general funding is adequate for schools to educate ELLs without significant additional resources, Petitioners point out that Group B funds are discretionary and can be used for any purpose. Petitioners then argue as follows: "Because group B funds are provided based on the number of students participating in ELL programs, a dramatic increase in group B funds could create

perverse incentives for schools to keep ELL students languishing in special-language programs." Petitioners' Brief at p. 64. Not only is this purely speculative possibility insulting to *Amici* and all Arizona school districts that try to educate students to the best of their abilities, it also ignores the accountability provisions of NCLB upon which Petitioners elsewhere rely so heavily.

IV. Neither General Funding Increases Nor HB 2064 Provide Adequate Resources for ELL Instruction.

A. General funding increases do not solve the problem of providing equal educational opportunities to all students.

Petitioners point to increases in M&O monies since 2000 to argue changed circumstances. The funding increases touted by Petitioners, however, have for the most part been necessary to keep pace with inflation and have not substantially increased the real spending power of Arizona's public school districts. If the increases in M&O funding over the past seven years created the type of surplus that would allow school districts to adequately fund their ELL programs with such funds, Arizona would not rank so low nationally in the amount of education dollars it provides per student. Petitioners also point to increases in federal funding to argue changed circumstances. Once again, many of these increases are tied to inflation and do not provide districts with leftover monies. Moreover, school districts cannot use

these federal monies to satisfy the State's obligation to provide adequate resources to implement its required ELL programs.

B. HB 2064 continues to fund ELL programs arbitrarily and capriciously.

HB 2064 provides school districts only $444 per pupil for ELL instruction. As discussed above, testimony at the hearing showed that school districts' ELL program costs ranged between $1,500 and $3,300 per student during the 2005-2006 school year, or four to nine times more than the funds provided by HB 2064 during the first two years of ELL instruction.

Contrary to Petitioners' repeated misleading assertions that districts may apply for additional funding under HB 2064 if $444 is not enough, many school districts, including *Amici* districts, are not entitled to receive much if any additional ELL instruction funding based on the funding scheme set forth in HB 2064. This is because HB 2064 unlawfully requires a school district to make offsets in monies it could otherwise request based on defined percentages of its Title I, IIA, III and Federal Impact aid monies and any desegregation monies it receives pursuant to A.R.S. § 15-910.

HB 2064's inadequate approach to providing resources for ELL programs is exacerbated by the law's two-year cut-off, which abruptly takes away the $444 per pupil once an ELL student has been classified as an ELL for two years irrespective of whether

that student has reached English proficiency. Petitioners euphemistically refer to the cut off as an "incentive," but that is not the way it reads in HB 2064: "funding for the same ELL pupil shall not be provided for more than two fiscal years." This two-year cutoff is arbitrary and capricious because many if not most ELL students do not reach proficiency within two years.

Both the Petitioners' witnesses and representatives from Arizona school districts testified that many ELL students fail to reach proficiency in two years. Petitioners' expert witness stated that "some children will certainly require more time" than two years to become proficient in English. *Flores II*, 480 F.Supp. at 1164. Petitioners' witness Kelt Cooper stated that he thought that "a bright young person with a great deal of support could probably be pretty good at a second language" within three years. *Id.* Looking to actual ELL data, witnesses from Arizona school districts all testified that it takes their ELL students more than two years to become proficient. In TUSD, students take an average of 4.6 years to become proficient. In NUSD, the number is between 4-5 years. In the Murphy Elementary School District, 86% of ELL students took longer than two years to achieve proficiency and in GUHSD, one of the most successful districts with respect to ELL test scores, at one high school 46% of students did not reach proficiency within two years and at another high school 15% of ELL students did not reach proficiency within two years. *Id.* at 1163-64. All *Amici* concur that large

numbers of their ELL students are not English proficient within two years. Based on these undisputed facts, the Ninth Circuit correctly found that:

> There is absolutely no evidence in the record to support the proposition that a student's need for ELL programs invariably vanishes after two years of instruction: Instead the evidence is squarely to the contrary, as all witnesses testified that some students would certainly take longer than two years to become proficient in English.

Flores III, 516 F.3d at 1177. As the District Court pointed out, in NUSD the two year cut-off would effectively reduce the district's Group B weight funds from $365 to $182/student when funding for non-English proficient ELLs is cut off after two years. *Flores II*, 480 F.Supp. at 1163.

CONCLUSION

Amici have a legal and moral obligation to provide a sound education to Arizona's ELL students. *Amici*, however, have struggled for years under a system of ELL funding that consistently and drastically fails to fund ELL programs in a manner that rationally relates to what their ELL programs actually cost. If the Ninth Circuit's ruling is not affirmed, *Amici* will be significantly impaired in their ability to provide ELL students with the education the law requires and that is necessary for ELL students to become productive members of society.

Because the District Court's March 2007 Order was appropriate and there is no basis for overturning it, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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